DREAMLAND CORP. (M) SDN. BHD.

v.

CHOONG CHIN SOOI & INDUSTRIAL COURT OF MALAYSIA

SUPREME COURT, KUALA LUMPUR
WAN SULEIMAN SCJ
MOHD. AZMI SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 414 OF 1986]
17 OCTOBER 1987

LABOUR LAW: *Dismissal - Whether dismissal without just cause or excuse and/or alternatively unfair labour practice - Principles of natural justice - Dismissed with immediate effect - Respondent was project manager - Claim for reinstatement to former position without loss in salary, monetary or otherwise.*

LABOUR LAW: *Domestic Inquiry - Right of hearing - Observance of procedural safeguards - Whether applicable to simple master/servant proceedings - Right of hearing applicable before an administrative tribunal and quasi-judicial tribunals performing Judicial functions.*

LABOUR LAW: *Industrial Court - Reference under s. 20(3) Industrial Relations Act 1967 (I.R.A.) - Dismissal upheld by Industrial Court - Effective date of dismissal - Awarded backwages from date of dismissal to date of award.*

LABOUR LAW: *Jurisdiction - Award referred to High Court - Section 33A IRA on question of law - Whether Industrial Court has jurisdiction to award compensation to workman whose dismissal upheld by Court - Date of dismissal amended - Whether Industrial Court has jurisdiction to amend date of dismissal of workman - Backwages - Workman deemed to be in employment until date of award - Award without jurisdiction.*

The appellant company had dismissed the 1st respondent, its Project Manager, with effect from 23 February 1984 by sending to the 1st respondent a letter dismissing him with immediate effect. By a reference to the Industrial Court which was made under s. 20(3) of the Industrial Relations Act 1967 ("the Act"), the 1st respondent contended that the dismissal was without just cause or excuse and/or alternatively was unfair labour practice. Further or in the alternative the 1st respondent contended that the dismissal was contrary to the principles of natural justice and therefore void, and consequently prayed for reinstatement to his former position in the company without loss in salary, monetary or otherwise.

However, the Company contended that on various occasions it had pointed out to the 1st respondent his casual and indifferent attitude towards his responsibilities. It also alleged that he had not shown any improvement despite admonition and in addition instigated or provoked dissatisfaction among fellow workers and consequently had caused it loss and therefore the dismissal was justified in law.

As a result of the award by the Chairman of the Industrial Court, the award was referred under s. 33A of the Act to the High Court on question of law being (1) does the Industrial Court have jurisdiction to award compensation to a workman whose dismissal has been upheld by the Court? and (2) does it have jurisdiction to amend the date of dismissal of the workman so that the workman is deemed to be in employment until the date of the award and thereby become entitled to backwages?

Held:

[1] The workman was lawfully dismissed as was held by the Industrial Court. However, neither that Court nor the High Court were correct in amending the date of dismissal and in awarding compensation as a consequence of such amended date, both matters outside their jurisdiction in an enquiry under s. 20(3) of the Act.

[2] The appeal was allowed, the finding of the High Court set aside and the award by the Industrial Court was quashed with regard to the effective date of dismissal and backwages and orders consequential thereon.

[Appeal allowed. Finding of High Court set aside. Award of Industrial Court quashed. Costs to appellant. Deposit to be refunded.]

Cases referred to:

Lee Wah Bank Limited v. National Union of Bank Employees [1981] 1 MLJ 169
Dr. A. Dutt v. Assunta Hospital [1981] 1 MLJ 304
K.C. Mathews v. Kumpulan Guthrie Sdn. Bhd. [1981] CLJ (Rep) 62
British Labour Pump Co. Ltd. v. Byrne (E.A.T.) [1979] IRLR 94
Sillifant v. Powell Duffryn Timber Ltd. (E.A.T.) [1985] IRLR 91
Earl v. Slater & Wheeler (Airlyne) Ltd. [1972] ICR 508
Workmen of the Motipur Sugar Factory Private Limited v. The Motipur Sugar Factory Private Limited [1965] AIR SC 1803
Premier Tyres Ltd. v. Workmen [1973] AIR Lab 1131
Lim Tow Peng & Anor. v. Singapore Bus Services Ltd. [1976] 1 MLJ 254
In re AMIN [1983] 3 WLR 258
Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor. [1984] 1 CLJ (Rep) 155
B.S.S. Kanda v. The Government of the Federation of Malaya [1962] MLJ 169
University of Ceylon v. Fernando [1960] 1 All ER 61
Sasa Musa Sugar Works (Pvt.) Ltd. v. Shobrati Khan [1959] AIR SC 923
Workmen of the Firestone Tyre & Rubber Co. of India Private Ltd. v. The Management [1973] AIR SC 1227
Calvin v. Carr & Ors. [1979] 2 All ER 440

Legislation referred to:

Employment Act (Cap 122) [Sing], s. 14
Employment Protection (Consolidation) Act 1978 [UK], s. 57
Industrial Relations Act 1967, ss. 20(1),(3), 30, (1), (6), 33A

Other sources referred to:

The Industrial Disputes in Malaysia, C.P. Mills., 2nd Edn., p. 121

For the appellant - C.V. Das (R. Rajasingam with him); M/s. Shook Lin & Bok
For the respondents - B. Lobo; M/s. Lobo & Associates

JUDGMENT

Wan Suleiman SCJ:

The appellant Company had dismissed the respondent, its Project Manager, with effect from 23 February 1984. The company did so by sending Choong a letter dismissing him with immediate effect.

Choong contends that the dismissal was without just cause or excuse and/or alternatively was unfair labour practice. Further or in the alternative Choong contends that the dismissal was contrary to the principles of natural justice and therefore void, and therefore prayed for reinstatement to his former position in the company without loss in salary, monetary or otherwise.

The reference to the Industrial Court was made under s. 20(3) of the Industrial Relations Act 1967.

Before the Industrial Court the case for the Company was that on various occasions it had pointed out to Choong his casual and indifferent attitude towards his responsibilities. It also alleged that he had not shown any improvement despite the admonition and in addition instigated or provoked dissatisfaction among fellow workers. This, it said had caused it loss and therefore the dismissal was justified in law.

The Industrial Court heard witnesses both for the appellant and for Encik Choong and after due deliberation the following award was handed down by the Chairman (who sat alone):

1. I find that there is evidence that the Claimant had talked about the low salaries and low increment to the staff in the Company, and this to my mind brings about a bad effect among the staff concerned, so I uphold the dismissal of the Claimant by the Company.

2. The Claimant had committed a misconduct and before such dismissal took effect the Company did not hold any inquiry at all. Though I uphold the order of dismissal of the Claimant the effective date of such dismissal takes effect on the last date of the hearing; therefore the Claimant is entitled to backwages from the date of dismissal 23 February 1984 till 28 April 1986, i.e., 26 months and 4 days at the rate of RM2,400 a month ... RM62,720.

3. The Company is to pay this sum within one (1) month from the date of this Award after tax clearance.

This award was referred under s. 33A of the Industrial Relations Act to the High Court on question of law, the question or issue of law being: (1) does the Industrial Court have jurisdiction to award compensation to a workman whose dismissal has been upheld by the Court?, and (2) does it have jurisdiction to amend the date of dismissal of the workman so that the workman is deemed to be in employment until the date of the award and thereby become entitled to backwages?

Regrettably there was no written Grounds of Judgment. At the end of the hearing the learned Judge recorded a cryptic note which we set out hereunder:

> Section 20(1) Where a workman ... considers that he has been dismissed without just cause or excuse by his employer ... these words include not only the reason for the dismissal but also the manner of the dismissal more particularly as in this case rules of natural justice not observed in that the enquiry was not held. What the Industrial Court Award means is that after its own inquiry there were reasons for the dismissal but as the inquiry was not held, the dismissal was without just cause or excuse.
>
> Hence the order for payment of backwages because until then it could not be said that the workman had been dismissed without just cause or excuse.
>
> The Secondary order would be no reinstatement - hence no award of compensation in lieu of reinstatement. Choice of words by Industrial Court may be unfortunate but basis of decision is correct in law.
>
> Application dismissed with costs.

We have perforce to make do with this.

Mr. Das for the appellant submits that there are two issues of jurisdiction.

It is common ground that (1) the worker's dismissal was justified and (2) that there was no domestic order or inquiry.

He contends that there is no jurisdiction under s. 30 of the Industrial Relations Act for the Industrial Court to award relief to a worker whose dismissal it has upheld, and that therefore the award is without jurisdiction.

He went on to say that under s. 20(1) of the Act, it is the workman who represented that he had been dismissed without just cause or excuse. Referring next to s. 30(1) and (6) his contention is that unless there is a finding for the workman on the question of liability i.e., that he had been dismissed without just cause or excuse, there is no jurisdiction in the Industrial Court to offer relief. This condition precedent had not been met.

In *Lee Wah Bank Limited v. National Union of Bank Employees* [1981] 1 MLJ 169 the Industrial Court after hearing an application by a bank employee made an award on the following terms:

> The Court now awards that the dismissal of the Claimant by the Bank do stand. However, in view of his long service with the Bank and the fact that the complaints in question are not of a criminal nature, the Court directs that any benefits due under the relevant collective agreements or agreement up till date of dismissal shall be paid over to him.

Hashim Y.A. Sani J (as he then was) considered the power of the Industrial Court, the part relevant to this appeal being set forth hereunder:

> How wide then are the powers of the Industrial Court under s. 30(6)? According to s. 30(6) of the Act the Industrial Court in making an award should not be bound to restrict itself to the specific relief asked for nor to the demands of the parties. The Industrial Court in making the award may include in the award any matter which it thinks necessary or expedient for the purpose of settling the dispute or the reference. That is the gist in clause (6) of s. 30 of the Act. In my view the apparent broadness of the language used here does not go beyond what is already conferred on any person (or body) by s. 40(1) of the Interpretation Act 1967 ... These are powers which are necessarily implied and nothing more. Since the Industrial Court is a creature of the Industrial Relations Act, 1967, its powers must be discovered only from the four corners.

Our attention was also drawn to what the Federal Court said in *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 at p. 313, (in response to contention on behalf of the Hospital) that the extension of a s. 30 award to a reference under s. 20(3) is an excess of jurisdiction save in the limited award of wages for the interim period until reinstatement and has no effect where the Industrial Court does not order reinstatement: in other words, all or nothing.

It should be noted that s. 30(6) uses the term "relief", not compensation or reinstatement. Counsel added that there is considerable uncertainty in the Industrial Court as to the consequences to the employer who dismisses a worker without a domestic hearing. He cites from a passage headed "The domestic inquiry: consequences of employer's failure adequately to inquire" - in "*The Industrial Disputes in Malaysia*, 2nd Edn., by C.P. Mills" commencing from p. 121 which discusses conflicting decisions of the Industrial Courts, which not being Courts of record are relevant, for the purpose of this appeal, only to show the uncertainty on this issue in those Courts.

We were also referred to the Federal Court decision in *K.C. Mathews v. Kumpulan Guthrie Sdn. Bhd.* reported in the [1981] CLJ (Rep) 62 where in dismissing the appeal the Federal Court held that no inquiry need be called in the circumstances of the case because the appellant knew all the time how dissatisfied his employer was with him and the inquiry would have served no useful purpose.

Inquiry seems to be a rule of practice in Britain. In *British Labour Pump Co. Ltd. v. Byrne (E.A.T.)* [1979] IRLR 94 wherein the Employment Appeal Tribunal held:

> Where an employer has not followed a proper procedure, the right approach is for the Industrial Tribunal to ask two questions. First, have the employers shown on the balance of probabilities that they would have taken the same course had they held an inquiry, and had they received the same information which that inquiry would have produced? Secondly, have the employers shown that in the light of the information which they would have had, had they gone through the proper procedure, they would have been behaving reasonably in still deciding to dismiss?

See also *Sillifant v. Powell Duffryn Timber Ltd.* (E.A.T.) [1985] IRLR 91. It was submitted that under both tests failure to hold an inquiry was an irregularity **not** fatal to the employer's case. See also *Earl v. Slater & Wheeler (Airlyne) Ltd.* [1972] ICR 508.

Referring next to the (English Employment Protection (Consolidation) Act 1978) s. 57 whereof relates to the general provisions regarding fairness of dismissal and have provisions similar to our own. Subsection 3 thereof requires an Employment Tribunal to satisfy itself that the employer had in the circumstances (having regard to equity and the substantial merits of the case) acted reasonably in treating the circumstances as a sufficient reason for dismissing the employee.

India, we were told, has statutory provisions similar to those in our Act. The following passage from a Supreme Court decision in *Workmen of the Motipur Sugar Factory Private Limited v. The Motipur Sugar Factory Private Limited* AIR [1965] SC 1803 is relevant:

> Where an employer has failed to make an inquiry before dismissing or discharging a workman it is open to him to justify his action before the Tribunal by leading all relevant evidence before it. The entire matter would be open before the Tribunal. It will have jurisdiction not only to go into the limited questions open to a Tribunal where domestic enquiry has been properly held, but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. The important effect of omission to hold an enquiry is merely that the Tribunal would not have to consider only whether there was a *prima facie* case but would decide for itself on the evidence adduced whether the charges have really been made out.

In India it seems the failure is not fatal to the employer and he would be entitled to justify it before the Industrial Tribunal. If he had held the enquiry he should have been told that they would not interfere unless they want the enquiry to be fair. If no enquiry had been held, the matter is at large.

We were referred to a passage in the Kerala High Court decision in *Premier Tyres Ltd. v. Workmen* [1973] AIR Lab. 1131 at p. 1132:

> "Where a workman is dismissed from service for misconduct without holding an enquiry and the Industrial Tribunal or the Labour Court finds that the dismissal was justified, the employer is not liable to pay the salary to the workman from the date of dismissal till the date of the decision of the Tribunal or Court.

The same principle seemed to apply under the Singapore Employment Act (Cap 122 s. 14). See *Lim Tow Peng & Anor. v. Singapore Bus Services Ltd.* [1976] 1 MLJ 254.

Has the Court below jurisdiction in its power of revision to substitute its own finding, or is its jurisdiction limited to quashing the award?

Our attention was also drawn to the House of Lords decision in *In re AMIN* [1983] 3 WLR 258 at p. 263 which is support for the proposition that in reviewing the decision of an Administrative Tribunal the Kings Bench can only quash the decision without substituting its own.

This very principle was applied in the Federal Court decision in *Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor.* [1984] 1 CLJ (Rep) 155. At p. 160, Seah FJ (as he then was), in delivering the judgment of the Court said:

> We do not think that a proper approach had been adopted by the learned Judge of the High Court in dealing with the matter before him. In the exercise of his inherent supervisory jurisdiction over inferior tribunal of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review findings of the inferior tribunals. The High Court, it must be observed, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law.

Mr. Lobo for the respondent was unable to find authority to support the decision of the Court below. The best he could do was to cite the Industrial Court decision in *General Ceramic Manufacturers Sdn. Bhd. v. Non-metallic Mineral Product Manufacturing Employees' Union*, an award of the Industrial Court which of course is not a Court of record. Perhaps, he cited it in the Court below because the President of the Industrial Court who made this award is incidentally the same Judge of the High Court whose decision is now the subject of appeal. The Industrial Court there held that though the dismissal was for just cause the inquiry preceding it was conducted against the rules of natural justice, and therefore the dismissal did not take effect until the date of hearing by the Industrial Court. It therefore ordered payment of compensation.

Mr. Lobo also sought to rely on a passage on p. 241 4th Edn., of de Smith's *Judicial Review of Administrative Action* which reads:

> Although breaches of natural justice used to be assignable as "errors in fact", a ground of challenge presupposing that the impugned order was merely voidable, there is a substantial body of recent judicial decisions to the effect that breach of the *audi alteram partem* rule goes to jurisdiction (or is akin to a jurisdictional defect) and renders an order or determination void.

Therefore, he argues that failure by the appellants to give the respondent a hearing before they dismissed him makes the dismissal void, and that the subsequent hearing and finding by the Industrial Court cannot validate it. The High Court should therefore, he submits, quash the award of the Industrial Court and order reinstatement.

The authorities cited in support, namely, *B.S.S. Kanda v. The Government of the Federation of Malaya* [1962] MLJ 169, and *University of Ceylon v. Fernando* [1960] 1 All ER at p. 61, are however appeals against failure by administrative tribunals to observe the *audi alteram partem* rule, and are therefore inapplicable in this appeal.

The short answer to Mr. Lobo's argument is that the right to a hearing or as it is sometimes called the observance of procedural safeguards are only applicable in respect of a hearing before an administrative tribunal and similar quasi judicial tribunals performing judicial functions but do not apply to simple master-servant proceedings, such as the present one.

Also cited was the decision of this Court, *Dunlop Industries Employees' Union v. Dunlop Malaysia Industries Berhad & Anor.*, Supreme Court Civil Appeal No. 481/1986 [1987] CLJ (Rep) 86, which with respect is not applicable to the issues in the current appeal.

Mr. Lobo also sought to rely on *Sasa Musa Sugar Works (Pvt.) Ltd. v. Shobrati Khan* AIR [1959] SC 923, and cited the following passage:

> Suspension of a workman charged with misconduct until the conclusion of the domestic inquiry is an interim measure which the employer is entitled to take. It cannot be said that such suspension amounts to punishment. However, if the suspension is not followed by a regular domestic enquiry, even though the workman's misconduct is proved before the Tribunal and the workman is dismissed, the dismissed workman has to be paid his wages for the period of suspension until the date of the award.

However Mr. Lobo seems to have lost sight of the fact that we are dealing with a case of outright dismissal before an enquiry. The two later decisions of the Indian Supreme Court, namely, *Workmen of the Motipur Sugar Factory Private Ltd.* v. *The Motipur Sugar Factory Private Ltd.* AIR [1965] SC 1803 and *Workmen of the Firestone Tyre & Rubber Co. of India Private Ltd. v. The Management* AIR [1973] SC 1227 considered *Sasa Musa's* case in its limited application.

We have already considered the relevant passage in *Motipur's* case earlier, and do not propose to say anything more beyond saying that it is in accord with our view of the law in the instant appeal.

Finally there is that decision of the Privy Council in *Calvin v. Carr & Ors.* [1979] 2 All ER 440, the facts of which are as follows:

> The appellant was part owner of a racehorse which had some form in New Zealand. In March 1976 the horse raced for the first time in Australia, in a handicap. The horse attracted support in the betting and was backed down to short odds but ran poorly and only came fourth. A steward's inquiry into its performance took place and as a result of the inquiry the jockey was found to be in breach of r. 135a of the Rules of Racing of the Australian Jockey Club, by failing to give the horse full opportunity to win or to obtain the best possible place in the field, and the appellant was found guilty of being a party to the breach. The appellant was disqualified for one year and his membership of the Australian Jockey Club was forfeited. He appealed to the committee of the club pursuant to s. 32b of the Australian Jockey Club Act 1873 against his disqualification but his appeal was dismissed. The appellant brought an action against the Chairman of the club, the members of the committee and the stewards seeking a declaration that his purported disqualification by the stewards and the dismissal of his appeal were void on the grounds, *inter alia*, that the stewards had failed to observe the rules of natural justice or fairness and their decision was therefore invalid, and that accordingly the committee had no jurisdiction to hear or determine the appeal from it. The trial Judge held that, although in certain specified respects the stewards had failed to observe the principles of natural justice, the proceedings before the committee constituted a hearing *de novo* and the defects in the stewards' inquiry were thereby cured. The appellant appealed to the Privy Council, contending, *inter alia*, that the stewards' decision was void and the committee had therefore had no jurisdiction to entertain the appeal since it was a condition precedent of an appeal that there was a decision to appeal against, and that defects in the stewards' proceedings could not be cured merely by a fair hearing of his appeal by the committee.

It was held, *inter alia*, that there was no absolute rule that defects in natural justice at an original hearing could or could not be cured by appeal proceedings which had been correctly and fairly conducted. However, where a person had joined an organisation or body and was deemed, on the rules of that organisation and the contractual context in which he joined, to have agreed to accept what in the end was a fair decision, notwithstanding some initial defect, the task of the Courts was to decide, in the light of the agreements made and having regard to the course of the proceedings, whether at the end of those proceedings there had been a fair result reached by fair methods. On the facts, those who took part in racing were deemed

to have accepted the Rules of Racing and to be bound by the decisions of bodies set up under the rules, provided they received fair treatment and a consideration of their case on its merits. The appellant's case had received, overall, full and fair consideration and there was therefore no basis on which the Court ought to interfere.

The same could be said of the enquiry held by the Industrial Court in this instance.

Accordingly, we hold that the workman was lawfully dismissed as was held by the Industrial Court. However, neither that Court nor the High Court were correct in amending the date of dismissal and in awarding compensation as a consequence of such amended date, both matters outside their jurisdiction in an enquiry under s. 20(3) of the Industrial Relations Act.

We would therefore allow the appeal, set aside the finding of the High Court and quash the award by the Industrial Court with regard to effective date of dismissal and backwages and orders consequential thereon. Costs to the appellant here and below. Deposit to be refunded.

Also found at [1988] 1 CLJ 1